IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION TO COMPEL CARGILL, INC. AND CARGILL TURKEY PRODUCTION LLC TO RESPOND TO ITS JULY 10, 2006 SET OF REQUESTS FOR PRODUCTION AND INTEGRATED BRIEF IN SUPPORT

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and moves this Court for an order compelling Cargill, Inc. and Cargill Turkey Production LLC (collectively, "Cargill") to respond to its July 10, 2006 Set of Requests for Production. In support of its Motion, the State states as follows:

1. Cargill's objections to the State's discovery requests based upon the statute of limitations are without merit. The statute of limitations under Oklahoma law does not run against the State when it is acting, as is the case here, in its sovereign capacity to enforce a public right. Accordingly, Cargill's effort to unilaterally impose an arbitrary time constraint of 2002 on discovery is improper. The State's sought-after discovery pre-dating 2002 is relevant to establishing, *inter alia*, when Cargill's pollution-causing conduct in the Illinois River Watershed ("IRW") began and the nature, extent and effect of such conduct in the IRW since it began.

2. Cargill's objections to the State's discovery requests that seek documents regarding Cargill's knowledge and awareness of the environmental harms and health dangers

caused by improper poultry waste handling practices occurring outside the geographic area of the IRW are likewise without merit. Such discovery is relevant to establishing, *inter alia*, Cargill's knowledge and awareness of the environmental harms and health dangers that such similar practices occurring within the geographic area of the IRW could and would likely have.

I. Background

On July 10, 2006, the State propounded to Cargill 125 requests for production narrowly-tailored to central issues in this case. The requested documents and materials can be grouped into 13 categories:

1. Documents regarding poultry grower contracts (*See* Request No. 1);
2. Documents regarding feed formulas, hormones and medications (*See* Request Nos. 2-6);
3. Documents regarding the constituents of poultry waste (*See* Request Nos. 7-8);
4. Documents regarding the run-off / discharge / release of poultry waste into the environment (*See* Request Nos. 9-14, 124);
5. Documents regarding the environmental and human health effects / impact of the run-off / discharge / release of poultry waste into the environment (*See* Request Nos. 15-38);
6. Documents regarding the use, management, handling, storage, disposal, transport and land application of poultry waste (*See* Request Nos. 39-71);
7. Documents regarding communications with and guidelines given to Cargill poultry growers (*See* Request Nos. 72, 76-86);
8. Documents regarding the amount of poultry waste and poultry carcasses generated in the IRW (*See* Request Nos. 73-75, 113-16);

9. Documents regarding communications about the subject matter of the lawsuit (*See* Request Nos. 87-104, 119);

10. Documents regarding the nature or character of the legal relationship between Cargill and its contract growers (*See* Request Nos. 105-06);

11. Documents regarding Cargill corporate information and any document destruction (*See* Request Nos. 107-10, 125);

12. Documents regarding Cargill poultry production in the IRW (*See* Request No. 112);

13. Documents regarding the environmental quality, character or condition of waters in the IRW, as well as any environmental testing or analyses performed by Cargill within the IRW (*See* Request Nos. 117-18, 120-23).

In response to each of the 125 requests, Cargill objected to the extent that the requests sought documents prior to 2002 and, based upon this objection, refused to produce any pre-2002 documents. *See* Cargill Inc.'s Response to State of Oklahoma's July 10, 2006 Set of Requests for Production to Cargill, Inc. & Cargill Turkey Production, LLC's Response to State of Oklahoma's July 10, 2006 Set of Requests for Production to Cargill Turkey Production, LLC, attached as Exs. A & B.[1 & 2] In addition, Cargill objected to 34 of the State's requests on the ground that

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[1] Cargill Inc.'s Response to State of Oklahoma's July 10, 2006 Set of Requests for Production to Cargill, Inc. and Cargill Turkey Production, LLC's Response to State of Oklahoma's July 10, 2006 Set of Requests for Production to Cargill Turkey Production, LLC do not substantively differ.

[2] In addition, Cargill objected to every request on the basis of trade secret, privilege, overly burdensome and overbroad. "Confidentiality" and "Trade Secret" objections are to be dealt with pursuant to the confidentiality order contemplated by this Court's November 21, 2006 Order [DKT #985]. The State does believe, however, that Cargill has improperly designated documents under the confidentiality order. The State intends to address this issue pursuant to the procedures of the confidentiality order.

they sought "documents related to geographic areas outside the Illinois River Watershed" and, based on the objection, refused to produce any documents dealing with matters outside the IRW. *See* Exs. A & B, Requests 6, 7, 8, 9, 12, 18, 21, 27, 30, 33, 36, 39, 42, 48, 51, 54, 57, 62, 65, 69, 76, 78, 80, 82, 84, 99, 100, 101, 102, 105, 106, 113, 119 and 124. Indeed, Cargill's "General Objection C" reads:

> C. Scope; date and geographic range: Cargill Turkey objects to the absence of any reasonable limit to the date range and to the geographic scope in these document requests as overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Such objection includes but is not limited to the facts that, as currently phrased, Plaintiff's document requests purport to (1) seek information or documents prior to 2002, which Cargill Turkey understands to be the earliest time period allowed by the statutes of limitation applicable to Plaintiff's claims and (2) seek information or documents outside the geographic boundaries of the Illinois River Watershed.

See Exs. A & B, p. 2.

The parties have conferred on Cargill's objections.[3] Cargill's objections are without merit, and should be overruled. The State's Motion to Compel should be granted.

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[3] The parties met on October 10, 2006 and have made a number of efforts since that initial meeting to resolve the disputes. Since that date, Cargill made a production of approximately 15,000 pages of documents that appear to be in response to four of the State's 125 requests for production (requests nos. 1, 3, 84 and 107). *See* Ex. C (12/05/06 T. Hill to R. Garren Letter). The documents comprising this production were "label[ed] . . . to correspond with the categories in the request[s]." *See* Fed. R. Civ. P. 34(b). Cargill's second production on February 27, 2007, consisted of 1821 additional pages of documents, and apparently Cargill "produce[d] them as they are kept in the usual course of business." *See* Fed. R. Civ. P. 34(b); Ex. D (02/27/07 T. Hill to R. Garren Letter). And, on March 20, 2007, Cargill made a third production of documents which was, it appears, neither produced as they are kept in the ordinary course of business, nor organized and labeled to correspond with the categories in the State's requests for production. *See* Ex. E (03/20/07 D. Mann to R. Garren Letter). Cargill's midstream change in the manner of production, followed by a production that did not correspond to the requirements of Fed. R. Civ. P. 34(b), obviously has complicated tracking the completeness of Cargill's production and has prejudiced the State.

II. Legal Standard

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *General Electric Capital Corp. v. Lear Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2003). The Supreme Court interprets relevancy in the discovery context "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders,* 98 S.Ct. 2380, 2389 (1978).

III. Argument

A. A statute of limitations does not preclude discovery of the sought-after information

Cargill contends that the State's Requests for Production are restricted by an unidentified statute of limitations, and on this basis Cargill refuses to produce any documents (other than certain grower files)[4] created prior to 2002. Cargill's position is without merit. Cargill ignores the fact that the statute of limitations under Oklahoma law does not run against the State when it

[4] *See* Exs. A & B, p. 2 (Objection D).

is acting, as is the case here,[5] in its sovereign capacity to enforce a public right. *See State v. Tidmore,* 674 P.2d 14, 15 (Okla. 1983) ("We have long-recognized the general rule that statutes of limitations do not operate against the state when it is acting in its sovereign capacity to enforce a public right") (citations omitted); *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1988) ("From these cases we distill the general rule that statutes of limitation shall not bar suit by any government entity acting in its sovereign capacity to vindicate public rights, and that public policy requires that every reasonable presumption favor government immunity from such limitation").

Legal authority on this point was provided to Cargill in the course of the parties' meet and confer sessions. Cargill never provided the State any contrary legal authority, and Cargill's thus continued adherence to this objection is mystifying. Simply put, in light of the fact that the statute of limitations under Oklahoma law does not run against the State, there is absolutely no basis for Cargill to refuse to produce the requested discovery. The purpose and relevance of the requested discovery is clear: to establish (among other things) when Cargill's pollution-causing conduct in the IRW began and the nature, extent and effect of such conduct in the IRW since it began.[6] Cargill's alleged unlawful conduct began well before 2002. Information pre-dating 2002

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[5] *See, e.g.,* First Amended Complaint, Counts 4 (state law nuisance), 5 (federal common law nuisance), 7 (trespass) & 8 (violation of 27A Okla. Stat. § 2-6-105) [DKT #18].

[6] Even assuming *arguendo* that there might be a statute of limitations applicable to certain of the State's claims, it is well settled that discovery of matters occurring prior to the statute of limitations period may be had. *See* Wright & Miller, *Federal Practice & Procedure*, § 2009 ("In proper circumstances (particularly where such discovery is useful in understanding more recent events) discovery may be allowed about events that occurred at a time when a claim based upon them would be barred by limitations"); *Smith v. K-Mart Corporation*, 1995 WL 819119, *4 (E.D. Wash. Nov. 22, 1995) ("Discovery that is related to valid claims will be permitted, even if it extends to time periods outside the statutes of limitations described above. The statute of limitations described above will not bar relevant discovery"); *Barnett v. Boeing Company*, 2000 WL 1477185, *1 (D. Kan. Aug. 11, 2000) ("[I]t is well-established that discovery of conduct predating the liability period for a discrimination claim is relevant and

is therefore necessary for the State to investigate and prove the full extent of the injuries and damages sustained by the State.

B. The State is entitled to discovery of materials regarding poultry waste handling practices and their effects occurring outside the geographical area of the IRW

Cargill has refused to produce any documents pertaining to matters outside the geographical area of the IRW. This position is untenable. The State has brought, *inter alia,* common law claims based on intentional theories of trespass and nuisance. *See, e.g.,* First Amended Complaint, Counts 4, 5 & 6 [DKT #81]. The liability of each Poultry Integrator Defendant for intentional torts is joint and several. *See, e.g., City of Tulsa v. Tyson Foods, Inc.,* 258 F.Supp.2d 1263, 1297-1301 (N.D. Okla. 2003), *vacated in connection with settlement.* Restatement (Second) of Torts § 825 defines an "intentional invasion" in the context of a nuisance claim as follows: "An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct." (Emphasis added.) Thus, a central issue in this case is whether Cargill had prior knowledge or awareness that its poultry waste disposal practices could cause pollution in the IRW. One way this knowledge or awareness can be established is by demonstrating that Cargill had knowledge or awareness of the propensity of poultry waste to cause pollution in geographical areas outside

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courts have commonly extended the scope of discovery to a reasonable number of years prior to the liability period"); *Sheldon v. Vermonty*, 204 F.R.D. 679, 689 (D. Kan. 2001) ("The Court will overrule Defendants' objection to the time period. Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party"); *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 351, 358 fn 5 (N.D. Ill. 2005) ("While in certain instances it might be proper to deny discovery of documents on the ground that they would only be relevant to events occurring before an applicable limitations period, where the information is otherwise relevant, the statute of limitations is not a basis for barring discovery").

the IRW.[7] For example, by way of analogy, in product liability cases evidence of similar incidents is admissible to prove, *inter alia*, notice. *See, e.g., Ponder v. Warren Tool Corporation*, 834 F.2d 1553, 1560 (10th Cir. 1987) ("[E]vidence of similar accidents involving the same product is admissible under both Kansas strict products liability law and federal law to establish notice, the existence of a defect, or to refute testimony given by a defense witness that a given product was designed without safety hazards") (citations and quotations omitted) (emphasis added). Notably, use of evidence of similar incidents to show notice is not limited to only the products liability realm. As explained in *Robinson v. Missouri Pacific Railroad Co.*, 16 F.3d 1083, 1089-90 (10th Cir. 1994):

> "[E]vidence of similar accidents involving the same product is admissible under . . . federal law to establish 'notice, the existence of a defect, or to refute testimony given by a defense witness that a given product was designed without safety hazards.'" *Johnson v. Colt Indus. Operating Corp.*, 797 F.2d 1530, 1534 (10th Cir.1986) (quoting *Rexrode v. American Laundry Press Co.*, 674 F.2d 826, 829 n. 9 (10th Cir.), *cert. denied*, 459 U.S. 862, 103 S.Ct. 137, 74 L.Ed.2d 117 (1982)). Although *Johnson* and *Rexrode* concerned similar "accidents" arising in the products liability context, introduction of evidence of a prior near-accident under similar circumstances should be considered under the same legal rubric.

Likewise, in a trespass action the Tenth Circuit allowed the admission of evidence of a uranium exploration company's settlements with other landholders in similar incidents to show that the alleged trespass at issue was not unintentional. *See Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1362-66 (10th Cir. 1987).

The fact that improperly managed and disposed of poultry waste runs off and leaches into the environment causing environmental degradation and health concerns is not unique to the IRW. *See, e.g.*, Ex. F, at p. 2201 (Schroeder, *et al.*, "Rainfall Timing and Poultry Litter

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[7] Obviously knowledge and awareness of the propensity of poultry waste disposal practices to cause pollution predating 2002 would be of greater relevance on the issue of intentionality.

Application Rate Effects on Phosphorus Loss in Surface Runoff," 33 *J. Environ. Qual.*, 2201 (2004), states: "Over the past decade, control of nonpoint-source pollution has come to the forefront in efforts to improve water quality in the United States and elsewhere. The principal components of agricultural nonpoint-source pollution are sediment, bacteria, N, and P. Of these, P is the nutrient most commonly associated with accelerated eutrophication in freshwater systems because these systems are usually P limited. . . . A strong relationship exists between the rate of manure application and the concentration of total phosphorus (TP), dissolved reactive phosphorus (DRP), and particulate P in runoff"); Ex. G, sec. 1, pp. 4 & 24 (EPA, "Risk Assessment Evaluation for Concentrated Feeding Operations" (May 2004), states that pollutants released from concentrated animal feeding operations are transported by "surface runoff, air transport and redeposition, and groundwater flow. Nutrients, pathogenic organisms, hormones and metals may easily reach waterbodies via these means" and that "[m]icroorganisms associated with manure may present a significant risk to health. The population of several known pathogens may be quite high in manure. Runoff from land application sites may carry large numbers of organisms into streams. Recreational use of the streams may then bring people into direct exposure to large numbers of potentially pathogenic microorganisms. Several disease outbreaks have been associated with manure contamination of water or food that has been contacted by manure"). Indeed, other geographical regions have also struggled with the poultry industry's failure to properly manage and dispose of poultry waste. *See, e.g.*, Peter S. Goodman, "An Unsavory Byproduct: Runoff and Pollution," *The Washington Post* (August 1, 1991) (http://www.washingtonpost.com/wp-srv/local/daily/aug99/chicken1.htm) (last visited 04/04/07). Thus, to the extent Cargill possesses documents reflecting knowledge of the propensity of improperly managed or disposed of poultry waste to run-off and leach into the environment in

other watersheds, such documents are relevant and discoverable as they go directly to the issue of notice and intentionality.

Furthermore, it should not be overlooked that Cargill appears to approach environmental issues on a company-wide basis. For example, in a document entitled "Citizenship Report: Total Impact," Cargill states: "Cargill believes in continuous improvement to protect the environment. Every year, we learn more, refine our systems and venture closer to our ideal of reducing our environmental footprint. . . . We maintain one set of expectations for every part of Cargill, every country and each of our facilities." Ex. H, p. 6 (emphasis added). Yet Cargill's untenable position in discovery in this case is apparently that even if it had prior knowledge that poultry waste from poultry operations in some other geographical area outside the IRW was causing a river or lake to be polluted, that information is not relevant. This position is at odds with Rule 26(b), case law and simply does not make sense.[8] When discovery "appears" relevant, the party resisting discovery is obligated to show the requested discovery is outside the scope of Rule 26(b)(1) or is of such marginal relevance that the liberal disclosure required by Rule 26 is outweighed by the potential harm of disclosure. *Pulsecard, Inc. v. Discover Card Servs., Inc.*,

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[8] Indeed, further underscoring the relevancy of the sought-after discovery is the fact that Cargill has adopted the affirmative defenses asserted by its co-defendants. *See* Affirmative Defense No. 66 in Answer of Cargill, Inc. to Plaintiffs' [sic] First Amended Complaint [DKT #51]; Affirmative Defense No. 66 in Answer of Cargill Turkey Production LLC to Plaintiffs' [sic] First Amended Complaint [DKT #52]. A number of Cargill's co-defendants have asserted affirmative defenses alleging that they have conducted their operations and activities in accordance with industry standards and the prevailing state of the art and technology in the poultry industry. *See, e.g.,* Affirmative Defense No. 52 in Defendant Peterson Farms, Inc.'s Answer to First Amended Complaint; Affirmative Defense No. 48 in Answer and Affirmative Defenses of Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. to the First Amended Complaint [DKT #73]; *see also* Affirmative Defense No. 47 in Answer and Affirmative Defenses of Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. to the First Amended Complaint [DKT #73]. By their own admission, therefore, poultry waste handling practices in other watersheds and their impact in other watersheds are directly relevant to the claims and defenses in this lawsuit.

168 F.R.D. 295, 309 (D. Kan.1996). Cargill has done neither here and this Court should compel it to produce documents responsive to the State's requests.

C. Cargill's other objections are without merit

Cargill's other objections to the State's Requests for Production are without merit. For example, Cargill has repeatedly objected to the State's use of the term "reflecting, referring or relating to." Cargill Turkey Production, however, in its August 11, 2006 discovery requests to the State, similarly used the term "relating to" on multiple occasions. *See* Ex. I (RTP Nos. 5, 9-24, 26-33, 45-53).

Cargill has also objected to the terms whose meanings are plain in the context of the document requests. Unless otherwise noted, the terms used in the document requests are intended to have and should be given their plain English language meanings. Cargill, however, has objected to the terms "effects / impacts." *See, e.g.,* Exs. A & B, Requests 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 & 38. More specifically, the requests using these terms seek documents referring or relating to "environmental effects / impacts" or "human health effects / impacts" from various poultry waste disposal practices. There is nothing vague or ambiguous about the plain meaning of these words. Similarly, Cargill has also objected to such plain English terms as "use" of poultry waste and "handling" of poultry waste as vague and ambiguous. *See* Exs. A & B, Requests 39, 40, 41, 45, 46 & 47. There is simply no merit to Cargill's objections raised on grounds of vagueness and ambiguity.

Cargill's other boilerplate objections ("overbroad, burdensome, vague, ambiguous and not reasonably calculated to lead to the discovery of admissible evidence") are without foundation. A party resisting production has the burden of establishing lack of relevancy or undue burden. *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D. Kan. 1997) (*citing Peat, Marwick, Mitchell &*

Co. v. West, 748 F.2d 540 (10th Cir. 1984)). The party resisting discovery must show the court "that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Burke v. New York City Police Department,* 115 F.R.D. 220, 224 (S.D.N.Y. 1987). "The litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request." *Oleson,* 175 F.R.D. at 565; *see also Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3rd Cir. 1982) (the "mere statement by a party that the [discovery request] was overly broad, burdensome, oppressive and irrelevant is not adequate to voice a successful objection") (quotations and citations omitted). Boilerplate burdensomeness and relevancy objections that do not set out any explanation or argument for burdensomeness or irrelevancy are improper. *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006). Accordingly, Cargill's objections fail.

IV. Conclusion

For all of the above reasons, the State of Oklahoma respectfully requests the Court to compel Cargill to fully respond to the State's July 10, 2006 set of requests for production and produce the requested documents forthwith.

Respectfully Submitted,

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